The Central Law Journal.

ST. LOUIS, MAY 11, 1883.

CURRENT TOPICS.

For the sake of fair play, we print in another column a reply to the criticism of "H. S. C." upon the soundness of the decision of the Texas Court of Appeals in Woolridge v. State. We can not, however, yield conviction to his reasoning, nor do we approve altogether of the tone of his communication. It is no answer to a respectful and legitimate criticism, to class the critic in the genus Anser, nor to affect to doubt his sincerity and good faith. It would seem from statements of the *Albany Law Journal*, that the Texas courts have quite a record on this subject. After approving the view of our correspondent, that such decisions have a tendency to increase the number of victims of lynch law, it says: "What the jury meant is perfectly evident. The ' was probably inadvertently left out, but that did not make the verdict blind. Besides, the verdict might have been supported on the principle of *idem sonans*, as where the word *first* is pronounced something like *fust*. This Texas court has of late been rather technical about spelling. It has held that 'burgerally' will not answer for 'burglary;' nor 'guity' for 'guilty,' nor 'penty' for 'penitentiary.' The California court held that 'larcey' will not do for 'larceny;' and the Missouri court held that 'brest' will not do for 'breast,' which is simply ridiculous. On the other hand, the Louisiana court have held that 'gulty' will answer for 'guilty;' and 'mansluder' for 'manslaughter;' and the Indiana court have held 'assalt' good for 'assault.' And even the California court thought that 'defendances' would answer for 'defendants;' and the Texas court have thought 'gilty' and 'turm of too years,' good for 'guilty' and 'term of two years;' that 'deth' was near enough to 'death,' 'prisin' to 'prison,' 'penitentery' to 'penitentiary,' and 'dring of spirituous liquors' to 'drink of spirituous liquors.'"

The latest exhibition of this hypercritical tendency, as we regard it, of the Texas courts, that we have seen, is in the case of Booth v. Holmes, decided April 10, 1883. In that case the process was directed against one J. W. Booth, one of the parties defendant. But the process of the sheriff was in these words; "Executed December 6, 1875, by delivering a true copy of the within process to the within named defendant, *W.* Booth, in person, with accompanying copy of plaintiff's petition, December 6, 1875." This discrepancy the court held to be fatal. "The uncertainty in respect to the identity of the person served with the process is not relieved against by the description in the return of '*W. Booth*' as being 'the within named defendant;' the citation on its face describes the defendant as '*J. W. Booth*,' and '*W. Booth*' being a different name, it is left to be ascertained whether or not the sheriff was mistaken in supposing that the person named 'within' to have been described therein as 'W. Booth,' or whether, if he was not thus mistaken, he had served the process nevertheless upon a man of a different name than that of 'J. W. Booth.'" Why not regard the words "W. Booth" as surplusage? Then the return of service would have read, "on the within named defendant." If the service had been, by mistake, actually upon a man named W. Booth, that fact might have been shown by the defendant. But to reverse a judgment upon such an objection, by a party who was actually cognizant of the pendency of the suit, raised for the first time in the appellate court, is conducive to the growth of technicalities rather than the administration of justice.

The more the judicial abuse of writing insufferably and uselessly long opinions is looked into, the more hideous its proportions become. The *Albany Law Journal* has apparently been making some investigations recently, and states the result as follows: "That West Virgina court seems to be at its old tricks. In 19 West Virginia Reports, a volume of 814 pages, there are only 41 cases, an average of almost 20 pages to a case. There are cases covering the following number of pages respectively: 29, 43, 30, 126, 74, 68, 56. The legislature will have to enjoin these judges from writing such long opinions, as they did up in New Hampshire, very much to the betterment of the reports and the patience and pockets of the lawyers."

COVENANTS IN LEASES — LESSOR'S COVENANTS.

The covenants in a lease are either express or implied. Implied covenants are such as arise by construction from the use of certain words or forms of expression. The covenants usually implied on the part of the grantor are, that he has a title and therefore a right to make a lease, and that, in consideration of the rent to be paid him, the lessee shall not be disturbed in the possession by the lessor or those claiming under him, during the term of the lease. On the part of the lessee, the covenants implied are to pay rent, and to take proper care of the property. Implied covenants are binding upon a lessee only while he remains in possession of the premises. Upon an assignment of the lease his liability ceases, and the lessor must look to the assignee, who is liable for any breach of covenant occurring while he is in possession.

Covenants are also distinguished as real and personal. Real covenants are such as run with the land, and the performance or non-performance of which effect the value, nature or quality of the premises. Such covenants are binding upon the assignee by privity of estate. Personal covenants are mere personal obligations and are binding upon the person making them alone. Generally, all implied covenants run with the land. This is true of covenants for quiet enjoyment, whether express or implied. So the covenants to pay rent, to pay taxes, to repair, to insure, to deliver the premises in a good condition, to maintain a partition fence, to cultivate the land in a particular manner, not to carry on a particular trade on the premises, have been held to run with the land. As an assignee of a lease is bound by the covenant running with the land, he is also entitled to the benefit of such as are beneficial to him; such as to renew, to repair, for quiet enjoyment and for further assurance. The assignee, to be bound by these covenants, must be the assignee of the whole term, and not a mere sub-lessee nor the assignee of a sub-lessee. In such case there would be neither privity of estate nor of contract between the party and the lessor. So in certain cases it is necessary that the assignee be named in the covenant. This is the case where the subject-matter is not *in esse*, such, for example, as to erect a new house. But where the subject-matter is *in esse*, such as to repair a building then on the premises, the assignee will be bound whether named or not. [1]

We have now given a general summary of the subject, and will confine ourselves to the subject of the covenants usually inserted in a lease on the part of the lessor.

Covenant for Quiet Enjoyment.—Although this covenant is usually placed in a lease, it is not really necessary, as it is ordinarily implied by law. The words "lease," grant," and "demise,"[2] are held to imply covenants of warranty and quiet enjoyment. "Give implies a personal warranty, and is not always used. The word grant in a lease for years is a covenant in law, or, as you may call it, a general warranty, if it be not qualified by a covenant of warranty in fact."[3] The covenants implied by the words "demise," etc., extend to title, while that for quiet enjoyment extends only to possession. "The word demise imports a power of letting, as *dedi*, a power of giving."[4] So the words "without interruption so long as wood grows and water runs, and to his heirs, executors, administrators, or any other person or persons, who may represent him," amount merely to an implied covenant for quiet enjoyment.[5] This covenant, whether express or implied, only means that the lessor shall have such title to the premises as will enable him to give an unencumbered lease for the term demised. [6]

The lessor is responsible for his own acts and for the acts of those claiming paramount to the lease, but not for the acts of a mere trespasser. The covenant for quiet enjoyment insures the lessee a legal right to enter and enjoy the demised premises, and protection against any rightful disturbance. It

[1] See Martindale on Conv., secs. 343-350, and authorities cited.

[2] Gano v. Vanderveer, 37 N. J. L. 293.

[3] Coke on Littleton, 332 a, Butler's note, 332.

[4] Holden v. Taylor, Hob. 12; Maul v. Ashmeade, 20 Pa. St. 482; Hamilton v. Wright, 28 Mo. 199.

[5] See Knapp v. Marlboro, 29 Vt. 282; Scott v. Rutherford, 92 U. S. 107; Burney v. Keith, 4 Wend. 502; Young v. Hargraves, 7 Ohio, 68; Grannis v. Clark, 8 Cow. 36; Mayor, etc. v. Mabie, 13 N. Y. 151; Daupe v. Gennis, 37 How. Pr. 5.

[6] Gardner v. Keteltas, 3 Hill, 330; Knapp v. Marlboro, 34 Vt. 235; Playton v. Cunningham, 21 Cal. 229; Rantin v. Robertson, 2 Strobh. 366; Underwood v. Birchard, 47 Vt. 305.

implies no warranty against the acts of strangers. It confers upon the lessee the right to enter upon the premises. If he is prevented from entering by a former tenant, whose tenancy has expired, his remedy is against the tenant and not against the landlord. In fact the landlord is not entitled to the possession of the premises, and can maintain no action for them. The right of possession is in the lessee alone, and he must bring the action. The lessor's covenant is not a guarantee against damages resulting from the wrongful act of a third party.[7] If the lessor has no title to the premises demised at the time the lease is given, and enters into no covenant for quiet enjoyment, except against his own acts, a subsequently acquired title does not inure to the benefit of the lessee. His covenant operates only to prevent his own interference with the possession of the lessee. Nor is he bound to protect the lessee against the foreclosure of previous liens upon the property. But a lessee for years of premises, under a covenant for quiet enjoyment, is entitled, upon foreclosure and sale, to receive out of the surplus money, the value of the use of the premises for the remainder of the term, less the amount of the rent and any other payments to be made by him to the lessor. The value of his term can not be limited to a per centage on the value of the fee, nor will the price for which it is sold at the mortgage sale, be in any manner conclusive evidence of the value of the fee.[8] This covenant, it will be remembered, runs with the land and passes to any one who may become legally entitled to the term. [9]

Covenant to Repair.—In the absence of an express covenant to repair, the lessor is under no obligation to put the premises in good condition.[10] And the tenant must continue to pay rent, even though the premises are destroyed by fire in the meantime. This doctrine has, in some States,[11] undergone some qualification. Thus in South Carolina, when the destruction is by the act of God, or the public enemy, the tenant may elect to rescind, and, upon surrendering all benefits derived therefrom, be released from payment of rent.[12] In Louisiana the lessor must keep the premises in a condition fit to be used for the purpose for which they were leased.[13] An express covenant to repair will be enforced.[14] When no time is specified as to when the repairing is to be done, notice must be given by the tenant in order to put the lessor in default.[15] The law will presume that such repairs are to be made within a reasonable time, and in case[16] of default, the lessee may make the repairs and recover the expense from the lessor.[17] This can not be done when there is no express covenant, even though the premises become uninhabitable for want of repairs.[18] If the premises are destroyed by fire, the tenant must continue to pay rent until the landlord has had a reasonable time in which to comply with his covenant by repairing.[19] In such a case, the mere fact that the tenant continues to occupy a portion of the premises while undergoing repairs, is not of itself conclusive evidence that the premises are tenantable. [20]

A tenant can not refuse to pay rent because of a breach of the covenant to repair.

[7] Playton v. Cunningham, 21 Cal. 229; Guzzols v. Chambers, 78 Ill. 75; Gardner v. Keteltas, 3 Hill, 330; Cozzens v. Stevenson, 5 S. & R. 428; Haifield v. Fullerton, 24 Ill.278; Pendergost v. Young, 1 Foster, 238; University of Vermont v. Joslin, 21 Vt. 52; Knapp v. Marlboro, 29 Vt. 282; Dudley v. Falliott, 3 Dunn. & E. 584; Ludwell v. Musman. 6 Dunn. & E. 458; Howell v. Richards, 11 East, 633; Taylor's Landlord & Tenant, sec. 147; Berrington v. Casey, 78 Ill. 317; Wade v. Halligan, 16 Ill. 507; Lawrence v. French, 5 Wheat. 445; Duvall v. Creig, 2 Wheat. 61; Ludwell v. Needman, 6 Term. 458; Underwood v. Burchard, 47 Vt. 365; Jack v. Butt, 26 Ind. 286.

[8] Burr v. Streeton, 43 N. Y. 462; Codingham v. Dunham, 35 How Pr. 40; Johnson v. Oppenheim, 34 N. Y. Supreme Ct. 416.

[9] Sheldon v. Codman, 3 Cush. 318.

[10] Daupe v. Gennis, 37 How. Pr. 5; Fowler v. Bott, 6 Mass. 63; Wheeler v. Crawford, 86 Pa. St. 327; Crawford v. Wheeler, 4 W. N. C. 369; Kline v. Jacobs, 18 P. F. Smith, 57; Kitner v. Ege, 11 Harris, 305; Long v. Fitzsimmon, 1 W. & S. 532; Wein v. Simpson, 2 Phila. 158; Walz v. Rhodes, 1 W. N. C. 49; Taylor's L. & T. (7th ed.), 274.

[11] Watts v. Coffin, 11 Johns. 495; Maffatt v. Smith, 4 N. Y. 126; Tibbetts v. Percy, 24 Barb. 39; Leavitt v. Fletcher, 10 Allen, 121.

[12] Coogan v. Parker, 2 S. C. 255. See also Laws of New York, 1860, p. 592; White v. Montjimey, 58 Ga. 204; Dwier v. Maxwell, 56 Ga. 1.

[13] Coleman v. Haight, 11 La. An. 564.

[14] Prescott v. Otterstatter, 85 Pa. St. 534.

[15] Gerzebek v. Lord, 33 N. J. L. 240.

[16] Lunn v. Gaze, 37 Ill. 19.

[17] Hexter v. Knox, 63 N. Y. 561.

[18] Casad v. Hughes, 27 Ind. 141; Mumford v. Brown, 8 Cow. 475; Withy v. Mathew, 52 N. Y. 512; Benjamin v. Heney, 51 Ill. 492; Elliott v. Aiken, 45 N. H. 30; Morris v. Tillson, 81 Ill. 607; Kline v. Jacobs, 68 Pa. St. 57.

[19] Louder v. Kemps, 2 Car. & P. 375.

[20] Kip v. Meriom, 52 N. Y. 542.

Such a covenant is minor and subordinate. It would be otherwise, however, if the premises were entirely worthless for the purpose for which they were leased. His remedy is an action to have proper damages deducted from his rent. This is equitable, because the entry of the tenant precedes the performance of the condition, and he would thus enjoy a certain benefit from the lease, independant of the covenant. In the language of Judge Yeates,[21] "Every man's feeling's would revolt at the doctrine that the tenant should be suffered to occupy and enjoy the demised premises a whole year, on the ground that he did not make some trifling repairs, according to the contract. All that he could in common honesty require in such a case, would be to be allowed such a sum out of the rent as would be full amends for the loss and inconvenience he had been subject to by the want of such repairs, but not to be discharged absolutely from all liability to his landlord." [22]

The word repair, when used in such a covenant, does not mean merely to restore to a a good state after decay, injury, dilapidation or destruction. Thus, where the lessor covenants to "keep the premises in good repair" he is bound to restore buildings destroyed by fire. This may sometimes create hardship, but as was said in Walton v. Waterhouse,[23] "Although a man may be excused from a duty imposed on him by law, if he is disabled from performing it without any fault of his own, but when by his own contract he creates a duty as a charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by contract." [24]

Covenant to Renew.—A lessor is not bound to renew a lease unless he has expressly covenanted to do so, unless by his actions he has induced the tenant to make improvements upon the land, in which case equity will interfere and prevent him from putting an end to the lease.[25] Covenants for continual renewals are not favored by the law, as limiting to create perpetuities,[26] but when they are explicit, the weight of authority is in favor of their validity.[27] Such covenants must be reasonably certain and definite as to the length of the term and the amount of rent to be paid.[28] A covenant to renew upon such terms as may be agreed upon, is void for uncertainty.[29] The word "renew," in itself, when nothing appears to the contrary, imports a new lease on the same terms and conditions as the old one.[30] In order to comply with a covenant to renew, it is not necessary that the new lease shall contain a similar covenant of renewal,[31] even when the covenant is to "renew under the same covenants." [32] The privilege of renewal at the pleasure of the lessee implies at least one renewal on the same terms as the old lease, but not a perpetual renewal.[33] The covenant may be conditional upon the performance of certain covenants, or the payment of a fine, or bonus, such performance is then a condition [34] precedent to a renewal.[35]

As a defense to an action for breach of covenant to renew, the covenantor may plead, insolvency,[36] fraud, or misrepresentation, waste, or a breach [37] of covenant, on the part of the covenantee. But non-payment of rent is no cause for not renewing, when the covenant is independent.[38] When a lease contains a covenant to renew, before the premises can be demised for a new term, there must be a new lease or instrument of demise.[39] Notice of election to renew must be given the lessor, during the continuance, or at the expiration of the original term.[40]

[21] Obenmayer v. Nichols, 6 Binn. 159.
[22] Prescott v. Otterstatter, 85 Pa. St. 534.
[23] 2 Saunders, 422*a*, note, (2) 638.
[24] David v. Ryan, 47 Iowa 642; Phillips v. Stevens, 16 Mass. 238; Fowler v. Batt, 16 Mass. 63; Back v. Crain, 2 N. Y. 86.
[25] Robertson v. St. John, 2 Pro. Ch. 140; Pilling v. Armitage, 12 Ves. 78.
[26] Morrison v. Rossignal, 5 Cal. 64.
[27] Blackmore v. Boardman, 28 Mo. 420; Iggulden v. May, 9 Ves. 325; William v. William, 16 Ves. 84; Page v. Este, 54 Me. 319; Martindale on Conveyancing, sec. 354; Taylor's Land & Ten. (7 ed). sec. 333; 4 Kents. Com. 109.
[28] Akeel v. Padcliff, 13 John. 297; Cunningham v. Pattee, 99 Mass. 248; Prago v. Clark, 113 Mass. 283; Arnot v. Alexander, 44 Mo. 25.
[29] Rutgers v. Hunter, 6 John. Ch. 215; Whitlock v. Duffield, 1 Hoff. Ch. 110.
[30] Brown v. Parsons, 22 Mich. 24.
[31] Piggatt v. Mason, 1 Paige 412; Abell v. Radcliff, 13 John 297.
[32] Carr v. Ellison, 20 Wend. 178; Tracy v. Albany Exch. Co., 7 N. Y. 472.
[33] Creighton v. Mckee, 7 Phila. 324; Carr v. Ellison, 20 Wend. 178; Piggott v. Mason, 1 Paige 412.
[34] Copper Mining Co. v. Beach, 13 Beav. 478.
[35] Job v. Barrister, 39 Eng. L. & Eq. 599.
[36] Buckland v. Hill, 8 Ves. 92.
[37] Pendred v. Griffith, 1 Bro. C. C. 314.
[38] Tracy v. Albany Exch. Co., 7 N. Y. 472.
[39] Hunter v. Silver, 15 Ill. 174; Thieband v. First Nat. Bank. 42 Ind. 212.
[40] Renoud v. Dackman, 34 Conn. 512; Thieband v.

No particular form of notice is required, unless stipulated for in the lease, the intent and understanding of the parties as manifested by the acts, will control, and determine whether there has been an election, and notice to the lessor within the proper time,[41] where, however, the possession is merely for a longer term under the lease, the lease itself is, as to the future term, a lease *de futuro*, requiring only the lapse of the preceding term, to become a lease *de presenti*, such a covenant differs from one for a renewal at the election of the lessee. That contemplates the execution of some further instrument, instead of the mere continuance of the original one, an agreement for a longer term, is for a mere continuance of the same state. Thus a lease may be for one year, with the privilege of continuing for the three years at the option of the lessee. The original term must be for at least one year. If it is for any less period the letting will be construed as being for another term of the same duration. In all cases it will be upon the same terms and conditions unless such implication is rebutted by some act of one or both of the parties.[42]

Under this covenant it is not necessary that actual notice be given by the lessee of his intention to elect for a longer term. The actual continuance of the occupation is conclusive evidence of his election to hold the premises for a longer term. Actual notice when given, is notice only of the lessees intention to continue the same occupation upon the same terms as before, and an actual continuance of such possession is the best and most conclusive evidence of the intention to continue. "It is both a declaration and an act; —the expression of a wish and its execution.[43] If the lessee elects to continue at all, he will he held to have elected for the entire term provided for in the lease, which gives him the right to elect for a definite term only. Thus if the optional term is for three years, he can not claim a right to elect for any shorter term, where a lease is made for a certain term with the option of continuing it one, two or three years, there can be but one election, and in order to prolong the term more than one year beyond the original term, notice of such election must be given the lessor, and merely continuing in possession is not sufficient.[44]

It is a general rule of law that where a tenant holds over, by consent, either expressly or constructively given, after the determination of a lease for years, without a new contract for a definite period, he will be regarded as a tenant for years. This is true where there is no agreement between the parties as to a future term. But where there is an agreement that upon sufficient notice being given by the lessee, he shall have a new lease for a new term of years,such holding is referred to the contract and he is deemed to have elected to hold the premises for the term therein defined, whether the tenant has made such an election by his acts is a question of fact for the jury and not a question of law.[45]

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First Nat. Bank, 42 Ind. 212; A notice sent by mail, posted on the day before that on which the lease required notice to be given, is sufficient, although not received until several days later. Reed v. St. John, 2 Daly 313.

41 Clark v. Merrill, 57 N. H. 415; Griffin v. Griffin, 1 Sch. & L. 352; Rube v. Jervis, 1 Term. Rep. 229; Bagly v. Coop, of Leominster, 1 Ves. 475; Maxwell v. Wood, 13 Price 672; City of London v. Mitford, 14 Ves. 41; Baquhorn v. G. Hospital, 3 Ves. 295; Eaton v. Lyon, 3 Ves. 69; McAlfine v. Swift, 1 All. & B. 285; Dae v. Morse, 1 B. & Ald. 365; Dae v. Beggs, 1 Faurt. 367; Dales v. Baruerat, 9 La. Am. 352; Thieband v. First Nat. Bank, 42 Ind. 212; Woodcock v. Roberts, 66 Barb. 498; Schruder v. Gemeinder, 10 Nev. 355; Kramer v. Cook, 77 Mass. 550; Bradford v. Patten, 108 Mass. 153.

42 Bright v. McOnat, 40 Ind. 521; Prickett v. Richie, 16 Ill. 96; Chretion v. Doney, 1 N. Y. 419; Kramer v. Cook, 73 Mass. 550; Delashman v. Berry, 21 Mich, 292.

43 Finney v. City of St. Louis, 39 Mo. 177; Ames v. Schuester, 14 Ala. 600; Bradley v. Civel, 4 Cow. 349; Conway v. Starkweather, 1 Denio. 113; Jackson v. Salman, 4 Wend. 327; DeYoung v. Buchannan, 10 Gill. & J. 149; Hyatt v. Griffins, 33 Eng. L. & Eq. 75.

44 Fally v. Giles, 29 Ind. 114.

45 Clark v. Merrill, 51 N. H. 45; Kramer v. Cook, 73 Mass. 550; Kelso v. Kelley, 1 Daly 419; Woodcock v. Roberts, 66 Barb. 498; Bradford v. Patten, 108 Mass. 153.

THE BURDEN OF PROOF IN LIFE INSURANCE CASES.

One of the most important questions that arise in actions brought to recover upon life insurance policies is to determine upon which party rests the burden of proof. Of course, it is always incumbent upon the plaintiff to make out a *prima facie* case. But it is more particularly the question as to the burden of proof when a dispute arises as to the correct-

ness of the statements contained in the declaration or application, which we propose to discuss.

It would seem to be only in those cases where the statements are express or constructive *warranties* of the truthfulness of the facts stated, that any question can exist. Where the statements are *representations* merely, there appears to be no doubt that the burden of proof is upon the party relying upon their untruth.[1]

But we shall find that not only is there dispute as to what constitute warranties in these cases, but also, that when agreeing upon this point, the decisions are in conflict as to the burden of proof.

It may, therefore, be wise, in the first instance, to review briefly the question of what constitutes a warranty in a life insurance contract.

Where the statements are expressly declared to be warranties there can ordinarily be no doubt as to their character, but it is an almost universal practice to provide that the statements contained in the application, while not expressly made warranties, shall be the basis, and form a part of the contract of insurance. Whether these statements, so made a part of the contract, shall be deemed warranties or representations merely has often been considered by the courts. Although there are conflicting decisions, the weight of authority is undeniably that these statements are warranties, and are to be dealt with as such.

This subject has frequently been passed upon by the New York courts, and an unbroken line of authority is found in their decisions declaring such statements warranties. Thus in Foot v. Ætna Life Ins. Co.,[2] the court say, citing the earlier cases: "By the express language of the policy, the proposals and answers, and declarations therein made, are made part of the policy. Hence the two papers must be construed as if they were embraced in one. All the representations of the assured, contained in the policy by being written therein, or incorporated therein by reference to the proposal, are warranties, and must be substantially true, or the policy will be void."

So in Cushman v. U. S. Life Ins. Co.,[3] it is said: "The legal effect of making the application a part of the policy is, that what otherwise would be mere representations are converted into warranties.[4]

This seems to be the rule also in North Carolina,[5] New Jersey,[6] Iowa,[7] Maine,[8] and is so laid down in the opinion of Judge Christiancy, of Michigan, in Throop v. N. A. Fire Ins. Co.[9] The rule would appear to be otherwise in Tennessee,[10] Missouri,[11] and possibly in Minnesota.[12]

Assuming, then, as it seems we must, that such statements are warranties, we will take up the subject under discussion.

The English rule is stated as follows: "Should any dispute arise, upon the death of the assured as to the correctness of the statements made in the declaration, the burden of proof, it is said, will fall upon the plaintiff, with whom it will rest, before requiring the insurers to produce any evidence to impugn them, to make out by evidence their truths which is in fact the basis of the action and a condition precedent to any right to recover." [13]

In McLoon v. Com. Mut. Ins. Co.,[14] the court say: "An express warranty in a policy of insurance is a condition precedent, the burden of proving performance of which rests upon the assured. The nature and form of

[1] Campbell v. N. E. Mut. L. Ins. Co., 98 Mass. 381; Phœnix Mut. L. Ins. Co., 17 Minn. 497; s. c., 2 Ins. L. Jour. 223; Conver v. Phœnix Mut. L. Ins. Co., 6 Chicago Leg. News, 144; Jones v. Brooklyn Life Insurance Co., 61 N. Y. 79; Van Valkenburg v. Am. Pop. L. Ins. Co., 70 N. Y. 605; Throop v. N. A. F. Ins. Co., 19 Mich. 440; Murray v. New York L. Ins. Co., 85 N. Y, 236.

[2] 1 N. Y. 571.

[3] 63 N. Y.

[4] Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; 22 Am. Dec. 567; Burritt v. S. Co. Mut. Fire Ins. Co., 5 Hill, 189; Fowler v. Ætna Ins. Co. 6 Cow. 673; 16 Am. Dec. 460, note; Jennings v. Chenango Mut. F. Ins. Co., 2 Denio, 83; Murdock v. Same, 2 N. Y. 210; Chaffee v. Cattaraugus Mut. F. Ins. Co., 18 N. Y. 376; Chase v. Hamilton Ins. Co. 20 N. Y. 52.

[5] Babbitt v. L. & L. Ins. Co., 66 N. C. 70; 8 Am. Rep. 494.

[6] Am. Pop. L. Ins. Co. v. Day, 10 Vroom, 89; 23 Am. Rep. 198.

[7] Wilkinson v. Conn. Mut. L. Ins. Co., 30 Iowa, 119; 6 Am. Rep. 657.

[8] Williams v. N. E. Mut. F. Ins. Co., 31 Me. 219.

[9] 19 Mich. 440.

[10] Southern L. Ins. Co. v. Booker 9 Heisk. 606; 24 Am. Rep. 344.

[11] Schultz v. Merchants' Ins. Co., 57 Mo. 337.

[12] Price v. Phœnix Mut. L. Ins. Co., 17 Minn. 497; 10 Am. Rep. 166.

[13] Bunyon on Life Insurance, 84.

[14] 100 Mass. 472; 1 Am. Rep. 129.

the warranty may affect the amount of evidence to be required of the plaintiff in the first instance; but whether the terms used are affirmative or negative, the warranty is equally a condition precedent, performance of which must be proved by the plaintiff in order to maintain an action on the policy." So in Campbell v. New Eng. Mut. Ins. Co.,[15] it is said: "From the very nature of the case, the party seeking his indemnity or payment under the contract must bring his case within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon the plaintiff to present a case in all respects conformable to the terms under which the risk is assumed."

In an early New York case it was said: "A warranty is considered as a condition precedent, and whether material or immaterial, as it regards the risk, must be complied with before the accused can sustain as action against the underwriters.[16]

In none of the recent New York cases, so far as we have been able to discover, has our exact question been discussed; and though they seem to imply that the burden is upon the defendant, great stress is laid upon the nature and form of the pleadings. Thus in one of the most recent cases, it is said: "The rule is well established that in an action upon a policy of insurance where the answer admits the using of the policy and the allegations in the complaint, and alleges a breach of its conditions, the burden of proof is upon the defendant. and the plaintiff is entitled to recover unless the defendant satisfies the court or jury by a preponderance of evidence, that the conditions had been broken.[17]

In Van Valkenberg v. Am. Pap. L. Ins. Co.,[18] the court say "that if it be conceded that the condition is a warranty, it is a promissory warranty which is not a condition precedent." This doctrine seems difficult to reconcile with that of Ripley v. Ætna Ins. Co. [19]

In an other case it is said "the burden of proof on the pleadings rested with the defendant.[20]

15 98 Mass. 381.
16 Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; 22 Am. Dec. 567.
17 Murray v. N. Y. Life Ins. Co., 85 N. Y. 236.
18 70 N. Y. 605.
19 30 N. Y. 136.
20 Jones v. Brooklyn L. Ins. Co., 61 N. Y. 79.

In Babbitt v. S. S. and G. Ins. Co.,[21] the Supreme Court of North Carolina recognize the rule spoken of above making the statements warranties, and decide for that State upon whom rests the *onus probandi*. They say: "The application being therefore a part of the contract, an important inquiry was, whether the property was correctly described in the application. And the first question is, upon whom was the burden of proof? The burden of proof is upon the plaintiff. It would be otherwise if the application were not a part of the contract, but was a mere representation. Being a part of the contract, it was necessary for the plaintiff to set it out in his complaint; and it being in the nature of a warranty, or condition precedent it was necessary that the plaintiff should prove it." [22]

This seems to be the rule also in Connecticut,[23] Rhode Island,[24] and Iowa.[25] In Wilkins v. Germania F. Ins. Co.,[26] the latter court say: "As to whether the plaintiff had knowledge * * * there was no evidence one way or the other. This being so, the defendants contend that judgment should have been rendered in their favor, because all matters warranted are a part of the contract, and the burden is on the plaintiff to prove the truth of the matters warranted as a condition of recovery. It is not to be denied that it has frequently been so held.[27] This court assumed that the current rule in Miller v. Mut. Ben. L. Ins. Co.,[28] but the precise question was not involved in the case as holding a different rule.[29] For the purposes of this opinion it may be conceded that the general rule is that the burden is upon the insured to prove the truth of the matters warranted, as a condition of recovery. But there are some exceptions to the rule. Where the pleadings are so framed that the defendant assumes the burden of showing a breach of warranty it

21 66 N. C. 70; 8 Am. Rep. 494.
22 Citing Archbold's Nisi. Prius., title "Insurance"
23 Kelsey v. Univ. L. Ins. Co., 35 Conn. 225.
24 Wilson v. Hampden F. Ins. Co., 4 R. I. 159.
25 Miller v. Mut. Ben. L. Ins. Co., 31 Iowa 226; 7 Am. Rep. 122.
26 10 N. W. Rep. (Iowa) 916.
27 Campbell v. Ins. Co., 98 Mass. 381; McLoon v. Ins. Co., 100 Mass. 472; Jefferson Ins. Co. v. Cotheal, 7 Wend. 72, *supra*.
28 31 Iowa 216.
29 See Swick v. Home L. Ins. Co., 2 Dillon 160; and Halabind v. At. Mut. L. Ins. Co., Id. 166.

has been held that he has such burden.[30] In the case of Swick v. Home, cited above, it is held: "The statements and declarations in the application are warranties, and the defense here is that there has been a breach of some of these warranties. Where a party relies on the breach of such a warranty, he must establish it by evidence. This may not be the rule as to promissory warranties—that is where the party warrants what he will not thereafter do, or will refrain from doing something stipulated in the policy as to the future. In this case, the alleged breach of warranty is as to the statement of existing facts—the facts as to his health and the facts as to his habits—and the defendant avers the breach, and therefore it is for the defendant to show that there has been such a breach, and not for the plaintiff to prove that there was no breach."

It appears therefore that the form of the pleadings may have much to do in determining this question. In Throop v. N. A. F. Ins. Co.,[31] the question was argued at great length upon the pleadings, and though the court did not discuss that point, the result of the case is practically to declare the burden to be upon the defendant. Christiancy, J., dissented holding that the burden was upon the plaintiff. This case led to Rule 104, requiring insurance companies who relied upon breach of statements in the application, to set forth the same in their pleadings and to declare the breach relied upon.

It would therefore seem that where the defendant, either voluntarily, or in accordance with local rules of pleading, has relied upon a breach of warranty in his plea or answer, as a defense to the action, that the burden is upon him to prove the same. In other cases, there may be doubt, but, as we have seen, many courts of high authority, adhere to the same rule, and cast the burden upon the defendant.

F. R. MECHEM.

Battle Creek, Mich.

[30] Secte v. Gresham L. Ins. Co, 7 Eng. Law & Eq. 578.

[31] 19 Mich. 423.

SUBSTITUTION OF PARTIES—SUGGESTION OF DEATH — EVIDENCE OF DEED DESTROYED BY FIRE — EXCEPTIONS TO EVIDENCE — PRIORITY OF RECORD TO GOVERN.

STEBBINS v. DUNCAN.

United States Supreme Court, March 5, 1883.

1. Where the suggestion of the death of the original plaintiff was made by counsel for the devisees, both parties being present, and the court made the order, without objection, that the devisees be made plaintiffs in the case, this suggestion, made without objection, and the order of the court thereon, settles *prima facie*, for the purposes of the case, the fact of the death of the original plaintiff.

2. Where the existence of the original deed was proved, and its subsequent destruction by fire was also distinctly proved, it is competent for the party relying upon it to prove its contents.

3. Where the witnesses to the deed were shown to be dead, the method pointed out by law to establish the execution of the deed was by proof of the handwriting of the witnesses to the deed, and where there is more than one witness, proof of the handwriting of one is sufficient.

4. Where a party excepts to the admission of testimony, he is bound to state his objections specifically, and in a proceeding for error he is bound to the exceptions so taken.

5. Where copies of depositions are offered in evidence, it is not necessary to retake the depositions, nor to prove the death of the witnesses or their incapacity to testify, where the copy of the deposition was by consent substituted for the original, which was proved to have been destroyed by fire; and, being admitted to be a true copy, it was properly receivable in evidence.

6. In tracing titles identity of names is *prima facie* evidence of identity of persons, and where there is no proof to rebut the *prima facie* presumption raised by the identity of names in the patent and deed offered in evidence, it will be deemed sufficient proof of identity.

7. As a general rule, where the same person has executed two deeds for the same land, the first deed recorded will hold the title; and the fact that the deed through which the plaintiff derives title was recorded long prior to the record of the deed through which the defendant derives title, and the record thereof was proved by competent evidence, is sufficient to establish the title in the plaintiff.

In error to the Circuit Court of the United States for the Northern District of Illinois.

Geo. O. Ide and *John W. Ross*, for plaintiff in error; *Thomas Dent*, for defendants in error.

WOODS, J., delivered the opinion of the court:

This was an action of ejectment, originally brought by William B. Morris, in the Circuit Court of the United States for the Northern District of Illinois, against Howard Stebbins, the plaintiff in error, for the recovery of a quarter section of land, originally situated in Madison County, Illinois, but, when the suit was begun, situate in Stark County. Before the final trial of

the cause, to wit, on January 22, 1879, the death of the plaintiff was suggested, and the devisees named in the last will were made parties, as appears by the following entry upon the record of the court:

"Now come the parties by their attorneys, and Thomas Dent, Esq., the attorney of the plaintiff, suggests to the court the death of William B. Morris, and that Maria L. Duncan. Harriett B. Cooledge and Helen Cooledge are the devisees of said deceased; and, on motion of the plaintiff's attorney, it is ordered by the court that said devisees, Maria L. Duncan, Harriett B. Cooledge and Helen Cooledge be made plaintiffs herein."

The defendant pleaded the general issue. The cause was tried by a jury, who returned a verdict for the plaintiffs, upon which judgment was rendered in their favor for the lands in controversy. To reverse that judgment, the defendant in the circuit court has brought the case here upon writ of error. A bill of exceptions was taken upon the trial, from which the following statement of the case is made:

Disregarding the order in which the testimony was introduced, and arranging it chronologically, the plaintiffs below, to prove title in themselves offered the following evidence:

(1) An exemplification of a patent from the United States to one John J. Dunbar for the lands in controversy; (2) a certified copy of a deed for the same lands from John J. Dunbar to William Prout, dated January 6, 1818, said copy being certified to have been made February 3, 1875; (3) a certified copy of a deed for the same lands from William Prout to Joseph Duncan, dated May 2, 1834, and recorded in said county October 29, 1838; (4) certified copy of a decree in chancery in the United States Circuit Court for the district of Illinois, dated June 9, 1846, rendered in a cause wherein the United States were complainants and the widow and heirs of Joseph Duncan defendants, and of the proceedings under said decree by which the premises in controversy in this suit were sold to the United States; (5) certified copy of the deed to the United States under said decree for the same premises, made by William Thomas, commissioner, dated August 12, 1846, and recorded January 17, 1848; (6) certified copy of a deed for the same premises, dated December 28, 1847, and recorded June 5, 1848, to William W. Corcoran, executed by R. H. Gillett, solicitor of the treasury, in behalf of the United States, (7) certified copy of a deed for the same premises, dated December 20, 1867, and recorded March 12, 1868, from William W. Corcoran to William B. Morris; (8) certified copy of the will of William B. Morris and of the probate thereof, from which it appeared that Maria L. Duncan, Harriett B. Cooledge and Helen L. Cooledge, the plaintiffs, were his residuary legatees.

To sustain the title, which the plaintiffs contended that they derived through these documents, they offered other evidence, which will be noticed hereafter, but they offered no evidence of the death of William B. Morris, the original plaintiff, since the certified copy of his will and of the probate thereof, and the letters testamentary issued thereon.

The defendant Stebbins, to show title in his lessor, offered in evidence the following title papers: "(1) An exemplification of a patent by the United States to John J. Dunbar, dated January 6, 1818, for the lands in controversy: (2) a certified copy from the recorder's office in Stark County, Illinois, in which county the land is situate, of a deed, dated January 6, 1818, from John J. Dunbar to John Frank, conveying said land in fee, and recorded in said county June 18, 1870; (3) other title deeds, by which the title passed from the heirs of John Frank to Benson S. Scott: (4) the stipulation of plaintiffs that Stebbins, the defendant, was in possession of the land in controversy at the commencement of the suit under said Benson S. Scott as his tenant only, and, at no time, under any other claim."

No exceptions were taken by the plaintiffs to the introduction of these title papers by the defendant.

The real contest in the case was between the title of the plaintiffs deduced through the deed of Dunbar to Prout, and their subsequent muniments of title put in evidence, and the title of defendant derived through the deed of Dunbar to Frank, and the subsequent conveyances put in evidence by him.

The defendant was in possession of the premises sued for. His evidence, which was not excepted to, gave him a *prima facie* title, and, unless the plaintiffs showed a better title they should not have recovered the lands in controversy. It is, therefore, only necessary to consider the title which the plaintiffs claim to have shown in themselves. The errors assigned all relate to the admission by the court below of the evidence offered by the plaintiffs to sustain their title, and the charge of the court to the jury upon the effect of that evidence. These assignments of error we shall now proceed to consider.

The court admitted as evidence tending to prove the death of William B. Morris, the original plaintiff, the duly certified copy of his will and of the probate thereof in the probate court of the county of Suffolk, in the State of Massachusetts, and the letters testamentary issued thereon, and the court charged the jury, in effect, that this evidence, uncontradicted, was sufficient to show the death of Morris. The admission of this evidence and the charge of the court thereon are assigned for error.

Whether the evidence objected to was or was not competent and sufficient to prove the death of Morris, it was clearly competent, the death of Morris being proved, to show title in the plaintiffs. The objection to its admissibility must, therefore, fall, if there was other evidence to show *prima facie* the death of Morris. We think that the suggestion in the record of the death of Mor-

ris, and the order of the court making his devisees parties was sufficient for this purpose.

Section 10 of ch. 1 of the Revised Statutes of Illinois, p. 94 (Hurd, 1880), provides that "when there is but one plaintiff, petitioner or complainant in an action, proceeding or complaint in law or equity, and he shall die before final judgment or decree, such action, proceeding or complaint shall not, on that account, abate if the cause of action survive to the heir, devisee, executor or administrator of such decedent; but any of such to whom the cause of action shall survive may, by suggesting such death upon the record, be substituted as plaintiff, petitioner or complainant, and prosecute the same as in other cases."

The suggestion of the death of Morris, the sole plaintiff, was made in this case, as the record shows, by counsel for the devisees, both parties being present, and the court made the order, without objection, that the devisees be made plaintiffs in the case. We think that this suggestion, made without objection, and the order of the court thereon, settles *prima facie*, for the purposes of this case, the fact of the death of the original plaintiff. The statute provides upon whose suggestion of the death of a sole party plaintiff the court shall make his heir or devisee, etc., plaintiff in his stead. It certainly can not be the fair construction of the statute that a party may stand by and see the suggestion of the death of the opposing party entered of record, and his heir or devisee substituted in his stead, and upon final trial require further proof of the death, at least without some notice of his purpose to raise that particular issue. The death of the plaintiff, after the order of the court, may be considered as settled between the parties for that case, unless some motion is made or issue raised on the part of the defendant by which the fact of the death is controverted. We have been referred to no decision of the Supreme Court of Illinois where a different rule has been announced. In the case of Millikin v. Martin, 66 Ill. 17, cited by counsel for defendant, the court merely decided that where a party plaintiff had died and his heirs were substituted in his place, they must prove that the person under whom they claimed was seized of the title and that they were his heirs. But the report of the case clearly shows that the point now under consideration was neither decided nor touched. We think, therefore, that the ruling and charge of the court below did not prejudice the defendant.

The next assignment of error relates to the admission in evidence by the court of the certified copy of the deed from Dunbar to Prout, and the testimony offered by the plaintiff to sustain such copy. The deed purported to be a conveyance, with covenants of general warranty, by Dunbar to Prout, of the land in controversy, for the consideration of $80. It recited that Dunbar was the patentee thereof, and set out the patent in full. The following is a copy of the *in testimonium* clause of the deed, of the signatures of the grantor and witnesses, the acknowledgement, affidavit of the grantor of his identity, his receipt for the purchase money, memorandum of registration, and certificate of the recorder of deeds for Madison County, Illinois:

"In witness of all the foregoing I have hereunto affixed my hand and seal, at Washington City, in the County of Washington and District of Columbia, this 6th day of January, one thousand eight hundred and eighteen.

"JOHN J. DUNBAR. [Seal.]

"Signed, sealed and delivered in the presence of—

"SAMUEL N. SMALLWOOD,
"JOSEPH CASSIN.

"District of Columbia, County of——, ss.:

"Be it remembered that on this 6th day of January, 1818, the above-named John J. Dunbarr, who has signed, sealed and delivered the above instrument of writing, personally came and appeared before us, the undersigned justices of the peace, and acknowledged, in due form of law, the same to be his free act and deed, for the purposes therein set forth, and also gave his consent that the same should be recorded whenever it might be deemed necessary. In witness of all which the said —— has hereunto affixed his name and has undersigned the same.

his
"JOHN X J. DUNBARR.
mark.

"Acknowledged before—
"SAMUEL N. SMALLWOOD,
"JOSEPH CASSIN.

"I, John J. Dunbarr, do declare upon oath that I am the same person intended and named in the above deed, dated the sixth day of January, 1818, and more particularly in the patent therein recited at length, and further, that I was duly placed in possession of the patent for the land conveyed in the above deed, by receiving the same from the general land office.

his
"JOHN X J. DUNBARR.
mark.

"Sworn and subscribed to before me this seventh day of January, 1818.

"SAMUEL N. SMALLWOOD.

"Received this sixth day of January, 1818, from William Prout, the sum of $80, being the consideration money expressed in the above deed.

his
"JOHN X J. DUNBARR.
mark.

"Witness: JOSEPH CASSIN.
"Recorded June 23, 1818.

"State of Illinois, Madison County, ss.:

"I, John D. Heisel, clerk of the circuit court, and ex-officio recorder of deeds within and for Madison County, in the State of Illinois, do hereby certify the above and foregoing to be a true, perfect and complete copy of an instrument of writing or deed of conveyance now appearing of

record at my office in book E, pages 154, 155 and 156.

"In witness whereof I have hereunto set my hand and affixed the seal of said court, at office in the city of Edwardsville, this third day of February, A. D. one thousand eight hundred and seventy-five.

"[SEAL.] "JOHN D. HEISEL, Clerk."

The defendant below objected to the introduction of said certified copy in evidence, because the original deed was not so certified and proven as to make a certified copy from the record competent evidence under the laws of Illinois.

The court, without passing at that time upon the objection, and not then admitting said writing in evidence as a certified copy, permitted the plaintiffs, at their request, to make the following proofs:

"And thereupon" as the bill of exception states, "the plaintiffs proved, to wit: "(1) By Mr. Dent, one of the plaintiffs' counsel, that said counsel had had in their possession, prior to the great fire of October 8 and 9, 1871, in Chicago, an original deed corresponding substantially in contents to the writing offered in evidence, except that there was not attached to it the official certificate, dated February 3, 1875; that he had not compared said offered copy with said original, but he believed from recollection that it corresponded with the original, and that he had not made said alleged copy; that said original deed had been sent to said counsel in behalf of Wm. B. Morris, the then plaintiff, for use in this suit, and had been offered in evidence on the first trial; that said original deed had been burned up in the Chicago fire of October 8 and 9, 1871; further, that said original deed had been sent to Washington, and attached as an exhibit to the original depositions of E. J. Middleton and George Collard, hereinafter mentioned, and had been subsequently detached therefrom by leave of the court, and returned to Washington for use in taking the depositions of Henrietta Boone.

"(2.) The plaintiffs further offered to read in evidence a copy of the original depositions of E. J. Middleton and George Collard, taken *de bene esse* on September 21, 1870, at Washington, D. C., to which the defendant below objected. It was admitted that the depositions had been correctly copied by an attorney in the cause from the original depositions on file in the case; that the original depositions, with the other files and records of the court, were burned up in the fire at Chicago of October, 1871; that no order of the court had ever been made authorizing the filing of said copy as a substitute for the original depositions, and that no proceedings under any statute had been had for the purpose of restoring said original, but that after said fire the plaintiffs' counsel had procured said copy from the counsel of defendant, and, with his consent, had placed it on file in this cause as a copy of the original depositions.

"The court thereupon overruled each of said objections to the reading of the said copy of the depositions, and permitted the contents of said copy to be read in evidence, which was done; to which decision of the court the defendant then and there excepted.

"The contents of said copy so read were as follows: 'That said Middleton and Collard had carefully examined the signatures of Samuel N. Smallwood on said original deed purporting to be his in three different places, and aver the said signatures to be the genuine handwriting of said Samuel N. Smallwood; and that said original deed is annexed to their depositions as Exhit A; that they were personally acquainted with Samuel N. Smallwood in his life-time, and knew his handwriting, having often seen him write, and they have no hesitation in declaring said signatures to be his genuine signatures.'"

The plaintiffs also offered in evidence the deposition of Wm. W. Corcoran, who testified that in 1847 he purchased the lands in controversy from the United States at public sale and paid the purchase money for them into the treasury of the United States, and that, at the time of the purchase, he had no notice of any adverse claim.

The plaintiffs further read in evidence a certified copy of a commission from President Monroe, attested by Richard Rush, acting Secretary of State, and the seal of the United States, dated April 30, 1817, appointing Joseph Cassin, justice of the peace in the county of Washington, in the District of Columbia, until the end of the next session of the United States Senate, and no longer; also a certified copy of a like commission, dated September 1, 1817, appointing Samuel N. Smallwood a justice of the peace of said county until the end of said session, and no longer.

The plaintiffs also offered in evidence the deposition of Anthony Hyde, who testified that he was the business agent in Washington City of W. W. Corcoran; that he knew of the purchase of the land in question by said Corcoran in 1847, and of the payment by him of over $22,000 into the treasury of the United States for this and other lands; that from February, 1848, up to the time when his testimony was taken, February 24, 1875, he had attended to all matters touching the tract of land in suit, such as the payment of taxes and the appointment of agents, up to the time of the conveyance thereof by Corcoran to Wm. B. Morris; that he sent the original deed from Dunbar to Prout, attached to the deposition of E. J. Middleton and George Collard, to the counsel of plaintiffs below in Chicago, on October 11, 1870; that said deed was afterwards returned to obtain a deposition of one Mrs. H. H. Boone as to Joseph Cassin's signature, and was afterwards forwarded attached to a deposition of Mrs. Boone, to the clerk of the United States Circuit Court at Chicago, on or about January 26, 1871.

Hyde further testifies that he had paid the taxes on said lands for Mr. Corcoran from 1847 to 1864, mainly through agents who lived in Illinois, but

that he himself had for a year or two paid the taxes directly to the county officers.

Assuming for the present that the evidence offered to support the deed from Dunbar to Prout was competent and properly admitted, the question is presented whether the deed itself thus supported was admissible. We are of the opinion that it was.

The existence of the original deed and its destruction in the fire at Chicago, in October, 1871, was distinctly proved by the testimony of Dent, counsel for plaintiffs. He testifies that it had been sent to the counsel in Chicago of the original plaintiff in the case; that it had been offered in evidence on the first trial of the case, and had been burned with the other papers and records of the court in the fire mentioned. It was therefore competent for the plaintiffs to prove its contents. Thus, in Riggs v. Taylor, 4 Wheat. 486, the court said: "The general rule of evidence is, if a party intended to use a deed or any other instrument in evidence he ought to produce the original if he has it in his possession, or if the original is lost or destroyed secondary evidence, which is the best the nature of the case allows, will, in that case, be admitted. The party, after proving any of these circumstances to account for the absence of the original, may read a counterpart, or if there is no counterpart an examined copy, or if there should be no examined copy he may give parol evidence of its contents."

In the present case it does not appear that there was in existence any counterpart or examined copy of the destroyed deed. The only recource left to the plaintiff was to prove the contents of the original by a witness who knew its contents. This was done by the deposition of Dent. He testified that the original deed corresponded substantially in contents to the certified copy offered in evidence, except that there was not attached to it the official certificate of the court, dated February 3, 1875. The evidence made the copy competent for the purposes of the trial.

Having thus established the fact of the original deed and its contents, the plaintiffs below were in the same position as if the original deed was in their possession and they offered it in evidence. It remained for them to prove its execution.

It has been held by the Supreme Court of Illinois, that, under the act of February 19, 1819, for establishing a recorder's office, and which was substantially the same as the act of 1807, which was in force when the deed from Dunbar to Prout was executed, a deed is valid as between the parties to it without being acknowledged. Semple v. Miles, 2 Scam. 315. See also, McConnell v. Reed, Id. 371.

Having established by proof the fact that the deed had existed and had been destroyed, and that the copy offered in evidence was a copy of the original, it only remained to prove the signing and sealing of the deed by the grantor.

As the witnesses to the deed were shown to be dead, the method pointed out by law to establish the execution of the deed was by proof of the handwriting of the witnesses to the deed. Clark v. Courtney, 5 Pet. 319; Cook v. Woodrow, 5 Cranch 13. And when there was more than one witness, proof of the handwriting of one was sufficient. 1 Greenl. Ev. sec. 575; Adams v. Kerr, 1 Bos. & P. 360: 3 Prest. Abst. Tit. 72, 73.

By the depositions of Middleton and Collard, which the court admitted in evidence, the handwriting of Samuel N. Smallwood, one of the subscribing witnesses of the deed, was fully proven. His signature also to the acknowledgment of the deed as one of the justices of the peace before whom the acknowledgment was taken, and his signature to the jurat of an oath of identity indorsed on the deed, subscribed and sworn to before him by Dunbar, were proven by the same testimony. The genuineness of handwriting of Smallwood as a witness to the deed was placed beyond all doubt by the depositions of these witnesses. If, therefore, the evidence by which this proof was made was competent and admissible the execution of the deed from Dunbar to Prout was established, and the deed itself was properly admitted in evidence.

We are next to consider the question whether the copies of the depositions of Middleton and Collard, by which the handwriting of Smallwood was proven, were properly admitted in evidence. This evidence was objected to by defendant, and his objection was overruled, to which he excepted.

The admission of the parties, as appears by the bill of exceptions, showed the existence of the original depositions; that they had been destroyed with the other records of the court in the fire of October, 1871; that the copies were correct copies of the original depositions, and had been furnished by counsel for defendant, and with his consent had been placed on file in the cause as correct copies of the original. The objection made to the introduction of the copies was that the death of the witnesses was not shown, nor was it proven that they were incompetent to testify, and that their depositions could not be retaken; therefore proof of what they had testified in their depositions was not admissible.

The rule invoked to exclude copies of the depositions is that in the absence of evidence that the witness who testified in a former trial is dead or incapable of testifying, or that his deposition can not be retaken, it is not competent to show what his testimony in the former trial was; and that when the deposition of a witness which was read upon a former trial is lost, its contents can not be proved except after proof of the death of the witness whose testimony it contained. Stout v. Cook, 47 Ill. 530; Aulger v. Smith, 34 Ill. 537.

But if the witnesses had lived in another State, and more than a hundred miles distant from the place of trial, proof of the contents of their deposition would have been admissible. Burton v. Driggs, 20 Wall. 125. Therefore, to have made the objection tenable, it should have also been

put upon the ground that the witnesses were not shown to reside in another State and more than a hundred miles from the place of trial. This it did not do. When a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. Burton v. Driggs, *ubi supra*. The original depositions were taken in the city of Washington. It is, therefore, probable that the witnesses resided there. If the copy of the depositions had been objected to because it was not shown that the witnesses resided out of the district, and more than a hundred miles from the place where the court was held, the plaintiffs below might have supplied proof of that fact. The objection, as it was made, was not broad enough, and specific enough, and was, therefore, properly overruled and the evidence admitted.

But we think the rule relied on by defendant to exclude copies of the deposition does not apply to the case in hand. The plaintiffs did not offer oral evidence of the contents of the depositions, but offered copies which were admitted by counsel for defendant to be true copies. It was, therefore, not necessary to retake the depositions or to prove the death of the witnesses, or their incapacity to testify. The copy of the deposition was, by consent, substituted for the original, which was proven to have been destroyed, and, being admitted to be a true copy, spoke for itself. It was, therefore, properly received in evidence.

It was further objected to the admission in evidence of the proof relating to the deed of John J. Dunbar to Prout, that as the testimony to establish its execution was the proof of the handwriting of subscribing witnesses, it was necessary to prove the identity of the grantor in the deed; that is to say, that the John J. Dunbar by whom the deed purported to be executed was the same John J. Dunbar named in the patent for the lands in controversy. In any case slight proof of identity is sufficient. Nelson v. Whittall, 1 Barn. & Ald. 19; Warren v. Anderson, 8 Scott, 384; 1 Selw. N. P. 538, note 7 (18th ed.) But the proof of identity in this case was ample. In tracing titles identity of names is *prima facie* evidence of identity of persons. Brown v. Metz, 33 Ill. 339; Cates v. Loftus, 3 A. K. Marsh. 202; Gitt v. Watson, 18 Mo. 274; Balbie v. Donaldson, 2 Grant (Pa.) 450; Bogue v. Bigelow, 29 Vt. 179; Chamblee v. Tarbox, 27 Tex. 139. See, also, Sewell v. Evans, 4 Adol. & E. 626; Roden v. Ryde, Id. 629. There was no evidence that more than one John J. Dunbar lived at the date of the deed in Matthias county, Virginia, which the deed recites was the residence of the grantor, nor in the District of Columbia where the deed was executed, and there was no other proof to rebut the *prima facie* presumption raised by the identity of names in the patent and deed. But, besides the identity of names, there was other evidence showing the identity of persons. The patent and the deed bore date the same day, and the patent was cited *in hæc verba* in the deed. These circumstances tend strongly to show that the party by whom the deed was executed must have had possession of the patent. The deed recites that the patent was delivered to the grantor, John J. Dunbar, and the affidavit of John J. Dunbar, sworn to and subscribed on January 7, 1818, before Smallwood, a justice of the peace, and one of the subscribing witnesses to the deed, whose signature to the jurat is shown to be genuine, to the effect that he was the same John J. Dunbar to whom the patent was issued, was indorsed upon the deed.

After a lapse of 61 years, this evidence was not only admissible to prove the identity of the grantee in the patent with the grantor in the deed. but, uncontradicted, is conclusive.

We are, therefore, of opinion that the deed from John J. Dunbar to William Prout, which formed a link in the title of the plaintiffs, was sufficiently proven, and was properly admitted in evidence by the circuit court. The other muniments of title put in evidence by the plaintiffs were admitted without objection, and established *prima facie* their title to the lands in controversy. But it will be remembered that the defendant below had also shown a *prima facie* title to the lands in question; that both parties traced title through the patent of the United States issued to Dunbar, and through deeds apparently executed by him on the same day, to-wit: January 6, 1818,—one to William Prout, under which the plaintiffs claimed, and the other to John Frank, under which the defendant claimed.

The question, therefore, still remains, which is the superior title? According to the jurisprudence of Illinois, this must be settled by the fact which of the two deeds, apparently executed by Dunbar, was first recorded.

Section 15 of the act approved January 31, 1827 (Purple, Real Est. St. 480), provided as follows:

"All grants, bargains, sales, etc., of or concerning any lands, whether executed within or without the State, shall be recorded in the recorder's office in the county where such lands are lying, and being within 12 months after the execution of such writings, and every such writing that shall, at any time after the publication hereof, remain more than 12 months after the making of such writing, and shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent *bona fide* purchaser or mortgagee for valuable consideration, unless such deed, conveyance, or other writing be recorded as aforesaid, before the proving and recording of the deed, mortgage, or other writing under which any subsequent purchaser or mortgagee shall claim."

This act remains substantially in force. Hurd, Rev. St. p. 271, sec. 30.

By an act, approved July 21, 1837, (Purple Real Est. St. 496, 497,) it was provided that the recording of any deed, * * * whether executed within or without the State, by the recorder of the county in which the lands intended to be

affected are situated, shall be deemed and taken to be notice to subsequent purchasers and creditors from the date of such recording, whether said writing shall have been acknowledged or proven in conformity with the laws of the State or not, and that the provisions of the act shall apply as well to writings heretofore as those hereafter admitted to record. This is still in force. See Hurd, Rev. St. 1880, p. 271, sec. 31.

It was held by the Supreme Court of Illinois, in Reed v. Kemp, 16 Ill. 445, that an instrument affecting or relating to real estate may be recorded, though not proven or acknowledged, and the record will operate as constructive notice to subsequent purchasers and creditors. See, also, Choteau v. Jones, 11 Ill. 320; Martin v. Dryden, 1 Gilman, 213. And in Cabeen v. Breckenridge, 48 Ill. 94, the court declared that, "as a general rule, when the same person has executed two deeds for the same land, the first deed recorded will hold the title."

The evidence shows that the deed of Dunbar to Frank, under which the defendant claimed title, was not recorded until June 18, 1870. The plaintiffs contended that the deed from Dunbar to Prout, under which they claimed, was recorded on June 23, 1818, and it was shown that the deed from Prout to Duncan was recorded October 29, 1838, and the deed of Gillett to Corcoran, June 5, 1848, and the deed of Corcoran to Morris, March 12, 1868. If, therefore, the contention of the plaintiffs that the deed of Dunbar to Prout was recorded June 23, 1818, is sustained by competent proof, their title must prevail.

But it is insisted for defendant that there was no competent proof of the registration of the deed of Dunbar to Prout. The proof relied on was the testimony of Dent, that the certified copy from the records of the county of Madison was a copy of a deed which appeared of record in his office; and the certified copy of memorandum at the foot of the deed as follows: "Recorded June 23, 1818." Conceding that the certified copy of the deed from the records of Madison county would not be proof of the contents of the original deed, because such original deed had not been so acknowledged and certified as to make a certified copy competent evidence, yet the fact that such a record of the deed existed, was, by the law of Illinois, as we have seen, notice to subsequent purchasers. A certified copy from the record was, therefore, a proof that such a deed and memorandum was of record in the proper office. For it is a settled rule of evidence that every document of a public nature which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly-authenticated copy. Saxton v. Nimms, 14 Mass. 320; Thayer v. Stearns, 1 Pick. 109; Dunning v Roome, 6 Wend. 651; Dudley v. Grayson. 6 Mon. 259; Bishop v. Cone, 3 N. H. 513; 1 Greenl. Ev. sec. 484.

The memorandum at the foot of the record was the usual record evidence, competent and conclusive, that the deed had been recorded at the date mentioned. It was evidence of the date of the registration of the deed, because it was the duty of the recorder, by the nature of his office and without special statutory direction, to note when the record was made. 1 Greenl. Ev. sec. 483. But we think it may be fairly inferred from section 10 of the act of September 17, 1807, which was in force when it is claimed the deed from Duncan to Prout was recorded, that it was the duty of the recorder to note the time when deeds left with him for record were recorded. He was specifically required to note the date when the deed was received, and was liable to penalty of $300 for recording any deed in writing "before another first brought into his office to be recorded." 1 Adams & D. Real Est. St. 63. The making of a memorandum of the date of record was, therefore, an official act, which naturally fell within the line of his statutory duties, and a certified copy of it would be competent evidence to prove the memorandum and the date of the registration of the deed.

We are of opinion, therefore, that the fact that the deed of Dunbar to Prout was recorded on June 23, 1818, was proved by competent evidence, and that it therefore follows that the title of the plaintiffs was better and superior to that of defendants, who claimed under a deed for the same lands not recorded until June 18, 1870, more than 50 years after its date, and long after innocent purchasers had bought the lands and paid a valuable consideration for them.

The plaintiff in error contends that the act of 1837, *supra*, can not apply in this case, because at its date the lands in question were no longer within the limits of Madison county, but in the county of Putnam. But the act expressly declares that it shall apply to writings theretofore as well as those thereafter admitted to record. The deed of Dunbar to Prout was recorded under the act of 1807, *supra*, which required to be recorded in the county where the lands conveyed were situated. It was so recorded. No law of Illinois since passed has required any other registration of deeds by the parties thereto, or has changed the effect of the original registration. See act of February 27, 1841; 1 Adams & D. Real Est. St. 93, 94.

The view we have taken of the case renders it unnecessary to notice certain questions of local practice argued by counsel.

We find no error in the record of the circuit court. Its judgment must therefore be affirmed.

SUNDAY LAW—SHERIFF'S SALE—ADVERTISEMENT, PRINTED IN SUNDAY PAPER.

SHAW v. WILLIAMS.

Supreme Court of Indiana, March 16, 1883.

An advertisement of a sheriff's sale printed in a *Sunday* paper is not a compliance with the statute, and a sale under it is invalid.

Tippecanoe Circuit Court.

Elliott, J., delivered the opinion of the court.

The appellants complaint seeks an injunction to prevent the sale of real estate upon execution, and asserts a right to this relief upon the ground that the notice of sale was published in a Sunday paper.

The validity of what is commonly called the Sunday law is no longer an open question, its validity was affirmed in an early case and this holding has been again and again approved. Johns v. The State, 78 Ind. 332; s. c. 41 Am. Rep. 577,

The case is governed by our statute, for as we have a statute upon this subject the common law does not prevail. The question, therefore, is whether the act is one fairly within the operation of our Sunday law.

The sheriff is charged with the duty of giving due notice of sales, and the performance of any ordinary act connected with ones business or profession is usually considered an act of common labor. It would certainly not be proper for the sheriff to keep open his office on Sunday for the transaction of ordinary business, nor to make sales on executions on that day, nor to go about the country making levies on property. Extraordinary acts, or acts outside of the usual and ordinary course of the business of his office may be done, because such acts can not be justly regarded as done in the discharge of the duties of his vocation. Advertising sales can not be said to be an extraordinary act, or one not within the usual vocation of the sheriff; on the contrary, it is one of the principle duties of his ordinary business. It would be strangly inconsistent to allow a sworn officer of the law to do an act within the line of his ordinary official duties on Sunday, and yet punish a cigar seller, or a vender of goods for transacting his business on that day. It is clear on principle that the sheriff can not transact on Sunday the ordinary business of his office, but authorities are not wanting. In Smith v. Wilcox, 24 N. Y. 253, it was held that a contract for the publication of an advertisment in a Sunday newspaper was void under the provisions of a statute not unlike ours, and many cases are cited sustaining the holding. The court in the course of the opinion said: "The plaintiff necessarily, in the performance of their agreement by the publication of the advertisement violated the letter as well as the spirit of the act prohibiting the exposure of merchandise for sale on Sunday, and no action will lie upon such a contract. In a sense it was a contract by the plaintiff for the performance of servile work on the Sabbath.

They agreed to publish and circulate the advertisement of the defendant on Sunday by delivering a copy to their customers who should buy of them a copy of their paper, and incidentally they agreed to expose for sale and sell on that day their paper containing the advertisement. It was servile work in the same sense that the service of the attorney's clerk was, or that of a salesman of goods in a dry goods store would be."

The publisher of a Sunday paper undertakes to circulate his paper on that day to subscribers and and customers, and as the publishing of such a paper is his vocation, it necessarially follows that he engages in it when he circulates the paper owned by him. It would be a perversion of all principle to permit a sheriff to aid in the violation of a statute by employing the violator to publish legal notices, for we should then have the singular anomaly of the chief ministerial officer of the county encouraging the violation of a law which it is his sworn duty to enforce. More directly in point, than the case just commented on, is that of Scammon v. The City of Chicago, 46 Ill. 145. In that case it was held that a legal notice published in a Sunday newspaper was void, the court saying, of the notice and publication that, "To permit it to be given on Sunday is against the spirit and policy of our law. A large and most respectable portion of the community, consider it immoral to issue Sunday newspapers, and if these notices should be published in such papers only, property owners, entertaining these opinions, would have little chance of learning of the advertisement." In the case of Shaw v. Dodge, 5 N. H. 462, the court said: "It is not doubted, that the serving of civil process falls within the prohibition, and can not be justified, if done on the Sunday. "In Butler v. Kelsey, 15 John, 177, it was held that a writ of inquiry of damages can not be executed on Sunday. The case of Sterns appeal, 64 Penn. St. 447, decides that an order given to the Sheriff on Sunday is illegal. Our own case of Kiger v. Coats, 18 Ind. 154, holds that the delivery of an award on Sunday is not invalid, but that case is expressly put upon the ground that such an act is not within the ordinary vocation of the arbitrator, and the decision is, therefore, not in point in a case where the act clearly appears to be within the ordinary line of one's duty or profession.

An officer has no more right than a private citized to do an act in violation of law, and an ordinary official act which can be done upon one day as well as another without endangering the rights of any person, is an act in violation of our Sunday law. The fact that the sheriff directed the publication of the notices does not make the act of publishing it a lawful one. An act done in violation of a statute can not be made lawful by the direction of an officer, and it would be a solecism to affirm that an act done in violation of law constitutes a legal notice.

The printing of a newspaper is not all that is done by its owner; that is, indeed, work that may be done on a day other than Sunday; but the circulation of the paper, its delivery to subscribers, its sale to news-boys, or customers, is a work that is necessarially done on Sunday. The circulation is the most important part of the whole work of conducting the paper, for it secures readers for the advertisements, and profits, or at least compensation to the owner of the paper. The chief consideration in a contract for the publication of a legal advertisement is that the paper in which it is published shall be generally circulated and readers secured.

The owner of a Sunday paper is pursuing his ordinary vocation when he is engaged in circulating his paper, and he who engages in his ordinary vocation on that day transgresses the law. Many cases declare that an act of ordinary business performed on Sunday is unlawful. Among the cases enforcing and illustrating this principle are Link v. Clements, 7 Blkf. 479; Pate v. Wright, 30 Ind. 476; McCartley v. State, 56 Ind. 203; Mueller v. State, 77 Ind. 310; Rodgers v. Western Union Co. 78 Id. 169; s. c., 41 Am. Rep. 558.

A single case is cited by appellee, and that we do do not regard as authority; for it is the decision of a *nisi prius* court, is not sustained by the adjudged cases, and the reasoning of the judge by whom the decision was made, is unsatisfactory and inconclusive.

Judgment reversed.

NOTE.—Other than judicial acts were not a violation of Sunday at common law (Pearce v. Atwood, 13 Mass. 327), but Stat. 29, Car. 2, enacted that any person who "shall do or exercise any worldly labor, business or work of ordinary callings on the Lord's day, or on any part thereof (works of necessity and charity only excepted), shall forfeit 5*s*." In construing this statute, Lord Mansfield, in Drury v. Defountain, 1 Taunt. 135, said: "We can not discover that the law has gone so far as to say that every contract made on Sunday shall be void, although under their penal statutes if any man in the exercise of his ordinary calling should make a contract on Sunday, that contract would be void. It does not appear that the common law ever considered those contracts as void which were made on a Sunday, citing to this effect Comyns v. Boyler, Cro. Eliz. 485, he adds: "But though that case is not now law, it shows that there was nothing in the common law which would avoid a sale made on Sunday, otherwise this mention of the statute would not have been introduced." A and B made a trade on the Lord's Day, whereby A sold B a set of jewelry, and B gave in exchange a coat. A few days afterwards B returned the jewelry and demanded the coat, and on refusal brought action to recover its value. Held, that the transaction being on the Lord's Day was illegal, and that the plaintiff could not recover. Myers v. Meinrath, 101 Mass. 366; s. c., 3 Am. Rep. 368.

But if the exigency of the case can be such as to render it necessary that a creditor, in order to save his debt or procure his indemnity against liability should contract with the debtor on Sunday, such contract would not be void, but would come within the saving of the statute. Hooper v. Edwards, 18 Ala. 280.

Where the parties to a suit pending before a justice made an agreement for a settlement on Sunday by which the plaintiff received a certain amount in full, and agreed to discontinue the suit, and the defendant, relying on such agreement, failed to appear any further, and the plaintiff prosecuted the suit and obtained an unjust judgment against the defendant, of which he had no knowledge until after the time to appear had expired: *Held*, that equity would perpetually restrain the collection of such judgment, notwithstanding the agreement might be void at law by reason of being made on Sunday. Blakesly v. Johnson, 13 Wis. 530. The court follows Petition v. Lac, etc. R. Co., 14 Wis. 443; Merritt v. Baldwin, 6 Wis. 439.

Plaintiff contracted to publish an advertisement in the weekly (Sunday) edition of their paper for a year: *Held*, that as it did not appear, and was not to be presumed that the contract contemplated any labor to be done on Sunday, it must be held to be valid. Sheffield v. Balmer, 52 Mo. 474; s. c., 14 Am. Rep. 430.

As a general proposition, Sunday is a *dies non juridicus* but where a railway company, immediately after twelve o'clock of the night of Saturday with a large force of men take violent possession of a street, for the express and avowed purpose of finishing their track through its entire length before the next Monday morning, and it is evident they selected Sunday for their work for the express purpose of evading an injunction, and avoiding the process of court, and to obtain and hold the street without paying for it or the damages thereby occasioned to the property holders, a writ of injunction may lawfully issue on a Sunday, to prevent irreparable injury to property as imperious necessity demands prompt interposition of Chancery. Langabier v. F. P. & N. W. R. Co., 64 Ill. 243; See also Johnson v. People, 31 Ill. 469; See also, Note in 16 Am. Rep. 554, referring to Van Vechten v. Paddock, 12 Johns 178; s. c., 7 Am. Dec. 303.

A writ placed in the Sheriffs hands on Sunday, can not be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. Whitley v. Butterfield, 13 Cal. 335.

Under a statute declaring illegal all worldly labor and business, except work of necessity and charity, it is held that running passenger cars on Sunday is a violation o the law. Sparkhawk v. Union Passenger Co., 54 Pa. St. 401. Also running an omnibus in a city daily and everyday, is not a work of necessity or charity, and therefore unlawful if run on Sunday, Johnson v. Commonwealth, 9 Harris 102, since rest and quiet on the

Sabbath day, with the right and priviledge of public and private worship undisturbed by any worldly employment, are what the statute was passed to protect, and a bill complaining of the deprivation of these privileges is essentially a bill to enforce a penal statute."

So it is held that the mere carrying about and selling newspapers, on Sunday, would not amount to a breach of the peace, but the crying of newspapers in the public street, on Sunday, is a breach of the peace, as well might the oysterman cry his oysters, or the charcoal man ring his bell.

The peace of Sunday may be disturbed by acts which on other days can not be complained of, such acts as interfere with the rights which the law vouchsafes to the people who desire to observe that day as a period of religious observance and of rest from wordly business." Commonwealth v. Teaman, 1 Phila. 460.

A subscription may be lawfully made on Sunday, for the erection of a house of religious worship. Allen v. Duffie, 43 Mich. 1; s. c., 38 Am. Rep. 159. *Contra*: A church subscription made on Sunday, is void, and is not valid by a subsequent oral acknowledgment and promise to pay it without consideration. Collett v. Trustee's of M. E. Church, 62 Ind. 365; s. c., 30 Am. Rep. 197

A levy of execution on Sunday is void. Bland v. Whitfield, 1 Jones (N. C.) 122; Pierce v. Hill, 9 Port. 155. A sheriff in North Carolina may proceed on Sunday by distress to enforce the penalty for peddling without license. Cowles v. Brittain, 2 Hawks, 204. At common law the issuing of original process on Sunday was not illegal. Clough v. Shepherd, 31 N. H. 490. See also Haynes v. Sledge, 27 Am. Dec. 665. Service of a writ of *certiorari* on Sunday upon a justice to remove a case into the circuit court is void. Anderson v. Bierce, 3 Mich. 280. A service of notice of a motion in a cause made on Sunday was held irregular and void, Field v. Park, 20 Johns. 140. The return of an execution on Sunday, although that is return day, is void. Peck v. Cavell, 16 Mich. 9. The proceedings in a statute foreclosure are not void if the day of sale advertised happens on Sunday. The sale may be made on Sunday or postponed. Sales v. Smith, 12 Wend. 57. If a foreclosure sale would be void on Sunday, the notice of it would not necessarially be void, and the creditor may postpone the the sale. Ib.

It is held not making Sunday *dies juridicus*, within the meaning of the common law, to receive a verdict on Sunday, where a cause was submitted to a jury late on Saturday night, the jury having agreed on a verdict on the next day, Sunday. Reed v. State, 53 Ala. 402.

The execution of process or notice on which any legal proceedings are to be founded are void. Moore v. Hagan, 2 Dew. (Ky.) 437.

A bail bond or recognizance executed before an officer authorized to take the same on Sunday is legal and binding on the defendant and his sureties. Rice v. Commonwealth, 3 Bush, 16.

An undertaking of bail for murder entered into on Sunday during vacation is a case of necessity and valid. Hammons v. State, 59 Ala. 164; s. c., 31 Am. Rep. 13. In Flagg v. Inhabitants of Milburry, 4 Cush 244, the term "necessity" is defined not to mean "a physical and absolute necessity but a moral fitness or propriety of the work and labor, done under the circumstances of any particular case." In Chesapeake etc. Co. v. Bradley, 4 Cranch. C. C., a notice was served on Sunday, and it was held to be illegal, although the parties had appeared according to the notice, citing Monkhouse v. Roberts, 8 East. 547; and Rex. v. Crake, Cowp. 26.

The Lord's day is not to be reckoned as one of the four days during which an officer must keep goods after seizure on execution before sale. Tuttle v. Gates, 24 Maine 395.

A recognizance taken between midnight preceding and sunset of the Lord's day to prosecute an appeal in a criminal prosecution is void.

In the opinion above, the advertisement inserted by the sheriff in a Sunday newspaper was held to be a void step in the legal proceedings. The Supreme Court of Maine, in speaking of the invalidity of the recognizance, says: "The taking of the recognizance is purely a matter of contract between the defendants and the State to prosecute the appeal. This court has decided that a contract made on the Lord's day between individuals is not valid. And there is no reason why the same rule should not be applied to a contract made between the State and individuals." State v. Suher, 33 Me. 539.

A contract made on the Lord's day, by the overseers of a town for the relief of a sick pauper is not a violation of law. Aldrick v. Blackstone, 128 Mass. 148.

As to the validity of acts done on Sunday, see note to Coleman v. Henderson, 12 Am. Dec. 290.

A recognizance bond, to answer to a criminal charge, taken on Sunday, is valid. State v. Douglas, 69 Ind. 547.

A debtor legally arrested on Sunday, by virtue of an execution procured on that day, may obtain his discharge on the same day, under the execution law. King v. Strain, 6 Blackf. 447.

As to circumstances that were considered to justify holding court on Sunday. See State v. McGinsey, 80 N. C. 377.

An undertaking on appeal executed on Sunday, is valid. The execution of such bond is not "transacting judicial business," and is not prohibited by the Statute of Nevada. The State v. California, etc. Co., 13 Nev. 203.

Where a farmer, part of whose ordinary business it is to purchase and cultivate land, buys land on Saturday, agreeing to sign the papers on the next day, a note for the price signed accordingly on Sunday, can not be sued on. Morgan v. Baily, 59 Ga. 683.

A promise made on Sunday is void. Husey v. Roquemore, 27 Ala. 281.

A contract made on Sunday is void. Morgan v.

Richards, 1 Brown 171; *Contra*, 2 Ohio St. 387. Merely receiving a verdict on Sunday, and adjourning, does not render it *dies juridicus* within the meaning of the common law. Reed v. State, 53 Ala. 402.

An offer to rescind a contract on Sunday is void. Merritt v. Robinson, 35 Ark. 483.

A promissory note made on Sunday will not support an action and the court will take judicial notice of the fact when the day of the execution of a contract occurs on Sunday. The defence that the note was executed on Sunday, may be raised by demurrer. Clough v. Goggins, 40 Iowa 325.

Lending money to be repaid on demand is "business," within the meaning of the statute prohibiting "labor, business or work, except those of necessity or charity" on Sunday, and such an agreement is presumptively void, although money is retained and used without any offer to return it. Trowert v. Decker, 51 Wis. 46; s. c., 37 Am. Rep. 808.

In time of peace and order, it is illegal to hold a court of criminal inquiry on Sunday, but bail may lawfully be taken on that day. Weldon v. Colquitt, 62 Ga. 449; s. c., 35 Am. Rep. 128.

CORRESPONDENCE.

A DEFENSE OF WOOLRIDGE v. STATE.

To the Editor of the Central Law Journal:

Journalistic criticism of judicial acts, when really just and based upon a true statement of the principles enumerated in the opinion criticised, will ever be highly appreciated by the profession, for it tends to point out the defects in reasoning and the wrong conclusions intervening through haste or oversight, as well as to settle the just amount of weight to be given to each case as a precedent. But when resting upon a misrepresentation of the doctrine of, and an erroneous statement of the question in the opinion, such criticism is most pernicious.

The article in your number of April 27, by an Indiana critic, is an instance of the latter kind. It seems to have derived all its inspiration from the words "misspelled verdict" under the head "Contents" in your number of April 20, and it is not the first unjust criticism resulting from the critic's want of a correct understanding of the principle of the production criticised.

In Woolridge v. State, the question decided was neither one of misspelling nor of *idem sonans*. It was whether a verdict failing to find the degree as required by the Code, but using a well-defined English word with a meaning entirely different from that of the word required, is sufficient under the law of Texas to sustain a judgment imposing the death penalty; and it is plainly and fairly stated, ably discussed and justly determined by the learned judge in the opinion, the weight of which, as authority in Texas, can no more be affected by the criticism than can the galling waves on her gulf-coast be lightened by the winter song of a single individual of the genus Anser.

In the opinion, the court say: "The word used is '*fist*,' is properly spelled 'fist, and is a word as well-defined and as well-known to the English language as any other word in daily common use. It is further to be noted that this word 'fist' is not and can not, by contortion of pronunciation, be made to sound like the word '*first*,' and consequently the well-recognized doctrine of *idem sonans* is not applicable, and it must be eliminated from the discussion." Again they say: "Have the jury found the defendant guilty of murder in the first degree? To enable us to so hold, we must strike out from the verdict a word which they, the jury, have plainly spelled—a word in every-day use in our language—and substitute in its place another and entirely different word, which we only infer they must have intended instead of the one they have used. Can we do this? If so, then we can take the same liberty with any word used. If courts can be allowed to indulge in such inferences and intendments in a case involving the life and liberty of the citizen, then why have the inestimable right of trial by jury? If the court can substitute a verdict which the jury have not found, or find one, when they have found none at all, then why have a jury? If the jury are required to declare the issue found in their verdict, then, unless the issues are found by them, the verdict is not theirs. There must be no doubt, to be supplied by mere intendment or inference, when the life of a human being is dependent upon it. This court will not assume such responsibility whilst the law fixes the determination of the issue alone in the breast and conciences of twelve jurymen of the country."

Notwithstanding all this, the critic contends that the verdict finding the "fist degree" was not void in view of the statute requiring the jury to "also find, by their verdict' whether it (the murder) is of the first or second degree," and that "it only needed the aid of a little commonsense to make it clear." Would his little-commonsense-aid have made it clear if it had stated the head degree, hand degree, foot degree or side degree? If not, why could it take the "fist" out of the verdict any more than it could either of these? Why did the critic utterly fail to show any rule of law authorizing the appellate court to blot out from the verdict a well-defined and properly spelled English word, and to substitute another with an entirely different meaning, making it a part of the written verdict returned by the jury under the code?

The constitution of the United States and that of Texas, guarantee the right of trial by jury, and the law of the land requires the jury to find the verdict and to return it in writing, requiring that they shall "also find whether it is of the first or second degree," when they find the defendant

guilty of murder, and, therefore, to those learned in the law, it is enough to say *ita lex scripta est.*

The distinction between misspelling a word and the use of one properly spelled, with a meaning different from that required by law, has been clearly defined by our court of appeals in a later case, (Walker v. The State,) where murder was written "mrder" in the verdict, and by carefully reading the the two opinions, and thoroughly acquainting himself with the established rule of decision in such cases in Texas, the critic may be enabled to see wherein he misrepresented the opinion he criticised.

As the criticism leaves it in doubt whether the misrepresentations it contains are due to ignorance of the real principle of the opinion against which it is directed, or are the offspring of wilfulness, a merciful provision in the Texas Code suggests that the critic ought to have the benefit of the doubt, and in order that he may enjoy such benefit, space for this in your columns is respectfully craved. B. C.

Austin, Texas.

WEEKLY DIGEST OF RECENT CASES.

1. ATTORNEY AND CLIENT—SUIT FOR SERVICES—EXPERT TESTIMONY.

The court below was not bound by the opinions of the professional witnesses as to the value of the services rendered by the attorney for the administratrix, and as to the proper amount to be allowed therefor. The court was authorized to compare its own judgment as to such value with the opinions of the witnesses, and make such allowances as should be just. *Estate of Dorband*, S. C. Cal., March 28, 1883; 11 Pac. Coast L. J. 156.

2. COMMON CARRIER—CONTRACTS LIMITING LIABILITY—CONNECTING LINES.

When a carrier undertakes to carry goods. not only over his own route, but over connecting lines, he can not contract that his responsibility may terminate at the end of his own line. He will still be held responsible for the negligence not only of himself and his servants, but of his connecting lines. The exemption from liability is available only where the carrier forwards the goods in the manner and by the route with reference to which the contract is made. If he deviates from his route or forwards the goods by different conveyances from those contemplated by the agreement, he becomes an insurer of the goods, and can not avail himself of any exceptions made in his behalf in the contract. *Galveston etc. R. Co. v. Allison*, S. C. Tex., Galveston Term, 1883; 1 Tex. L. Rep 949.

3. CONSTITUTIONAL LAW—STATE REGULATIONS OF FOREIGN COMMERCE — INSPECTION OF IMMIGRANTS.

Section 2955 of the Political Code of California, so far as it requires the payment of seventy cents for each passenger, inspected to ascertain if he is afflicted with leprosy, coming into the United States by sea, and imposing a fine for non-payment upon the owners and consignees of the vessel bringing the passengers, is unconstitutional and void. *People v. Pac. Mail Steamship Co.*, U. S. C. C., D. Cal. April 16, 1883; 11 Pac. C. L. J. 225.

4. CONTRACT—ILLEGAL CONSIDERATION—NOTE IN PAYMENT OF LIQUOR LICENSE.

Under a local liquor law for the county of Appling, the sum of $1,000 was required to be paid for license to retail liquors in said county. The ordinary of the county granted a license, receiving therefor $560 cash, and a note for $500. When suit was bought by the county on said note the maker and indorsers thereof, set up by plea that the ordinary had no authority to take said note,and that the consideration of the same was illegal. *Held*, The consideration was not illegal. While the ordinary should have required the payment of the whole sum in cash, it being his duty so to do, yet the party applying for license obtained and has enjoyed the same, and can not avoid the payment of his note on the ground urged by him. 2. The penalty imposed by the 4th section of the act mentioned, acts of 1877, p. 331, under a strict construction of said act, we must hold to apply to one who sells without license, and not to an ordinary who grants, or a person who obtains license without the payment of $1,000 in cash. Hence the usual rule that, where a penalty is imposed as to the doing of a particular thing, any contract entered into for the purpose of inducing, or aiding, or furthering the illegal act would be void, does not apply. *Appling county v. McWilliams*, S. C. Ala., April 24, 1883.

5. CONTRACT — RESCISSION — EQUITY — MISTAKE—FRAUD.

A decree of a court of equity rescinding a contract for the sale of land, should be made only on the ground of mutual mistake or misrepresentation and fraud; unless the evidence of these be so clear as to leave no room for hesitation or doubt in the mind of the court, the parties should be remitted to their legal remedies. A chancellor may refuse to enforce the execution of a contract on the ground of improvidence, surprise or hardship; but should rescind a contract only for fraud, illegality or mistake. If an agent of the vendor attempt to impose on the vendee by representations which he ought to have known to be false, and which he did not know to be true, and the vendee falsely state the object of his purchase, in order to get a better bargain, neither of the parties act fairly, and a chancellor should refuse to interfere either to execute or rescind the contract, but should leave the parties to any legal remedies they may have. *Lynch's Appeal*, S. C. Pa., March 21, 1883; 14 Lanc. Bar. 189.

6. CONVEYANCE — DEED, ABSOLUTE IN FORM, A MORTGAGE—EVIDENCE.

In order to prove a deed absolute on its face to be a mortgage, a defeasance bearing date some days after the date of the deed may be put in evidence, together with parol proof to show that such defeasance was executed in pursuance of an agreement under which the deed was made and delivered. It is not necessary in such case to prove that

the defeasance was executed at the time the deed was delivered, provided there is evidence to show that the defeasance and the deed constituted but one transaction. *Umberhower v. Miller*, S. C. Pa.; 13 W. N. C., 73.

7. EASEMENT—RIGHT OF WAY—USE OF.
A right of way appurtenant to land and granted in general terms without restriction as to the mode of its use, may be employed for any lawful purpose in connection with the land, either by the owner of the land or by any one by his permission. *Gunsen v. Healy*, S. C. Pa.; 13 W. N. C., 75.

8. EQUITY — LIMITS OF JURISDICTION — ADVERSE POSSESSION.
When there is an assertion of title by the one party and a peremptory denial of such title by the others, together with an exclusive reception of the profits for a long period, and other acts indicating an adverse holding by the tenant in possession, and knowledge of such adverse holding and laches on the part of the claimant, relief can not be afforded by a court of equity. A court of law is the proper forum for the determination of the controversy. *Cowman v. Colquhoun; Chequiere v. Cowman*, Md. Ct. App.; 10 Md. L. Rec., April 14, 1883.

9. FEDERAL SUPREME COURT—QUESTION NOT REVIEWABLE ON ERROR.
The question of the validity of a decree of a foreign matrimonial court annulling the marriage between certain parties presents no question of which this court can take cognizance on a writ of error to the Supreme Court of a State, which court decided in favor of the validity of the decree of such foreign tribunal. No right, title, privilege or immunity, which could be claimed under the authority of the United States, was involved, and the validity of no treaty or statute of, or any authority exercised under, the United States was drawn in question, neither was there any statute or authority of the State relied on which was in conflict with the Constitution, treaties, or laws of the United States. *Roth v. Ehman*, U. S. S. C., March 19, 1883; 2 S. C. Rep., 312.

10. LIEN—VENDOR'S LIEN—ATTACHMENT—PRIORITY.
The lien and rights acquired by virtue of an attachment, judgment and sheriff's sale, are not superior, but subordinate to the rights of the holder of an unrecorded vendor's lien, of which notice was had at and before sale, but of which no notice was had when the attachment was levied, nor when the judgment was obtained. *Senter v. Lambeth*, S. C. Tex., Austin Term, 1883; 1 Tex. L. Rep., 936.

11. REMOVAL OF CAUSES—SINGLE CONTROVERSY—SEVERAL QUESTIONS INVOLVED.
Where a case involves the determination of several questions, and full and complete relief can not be afforded in respect to the single cause of action without the presence of all the defendants, it can not be removed to the circuit court from a State court on the petition of one of the defendants, who claims that there is but a single controversy between himself and the plaintiff on the ground of diverse citizenship. *Winchester v. Loud*, U. S. S. C., March 19, 1883; 2 S. C. Rep. 311.

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